

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JANICE BRANSON	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 01-1372
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

**MEMORANDUM AND ORDER**

AND NOW, this 29<sup>th</sup> day of December, 2005, upon consideration of the cross-motions for summary judgment (Doc. Nos. 13 and 16) and the reply brief thereto (Doc. No. 18) the Court makes the following findings and conclusions:

A. On July 3, 1997, Janice Branson, (“Branson”) filed for disability insurance benefits (“DIB”) under Title II of the Social Security Act, (“Act”) 42 U.S.C. §§ 401-433 for the period beginning on August 5, 1992. (Tr. 202-208; 233-238).<sup>1</sup> The claim was denied at the initial level, but upon reconsideration, the State agency determined on March 11, 1998, that Branson was disabled, but only as of February 28, 1997, and not prior thereto. (Tr. 113-114; 133-134). Branson did not agree as to the onset date and filed a timely request for a hearing. (Tr. 135; 137). Subsequently, Branson withdrew her request for a hearing and on October 29, 1999, the ALJ issued a dismissal of Branson’s hearing request. (Tr. 148; 52-157). Branson’s later request for review of the ALJ’s dismissal order was denied by the Appeals Council on March 6, 2001. (Tr. 162-163). On March 22, 2001, the instant action was filed in this Court but was remanded to the ALJ pursuant to 42 U.S.C. § 405(g), sixth sentence for further administrative action. (Tr. 170). On November 13, 2001, the Appeals Council remanded the case to the ALJ with specific instructions to the ALJ. (Tr. 199-200). The resultant administrative decision, upon which my review is based was decided on June 18, 2002, and further review was declined by the Appeals Council on November 23, 2004. (Tr. 4-5; 17-25). The instant appeal follows.

B. The ALJ found that during the relevant period, Branson had a severe low back disorder. (Tr. 21-22 ¶ 20; 23 Finding No. 5).<sup>2</sup> As of September 1995, but not prior thereto, the ALJ found

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<sup>1</sup> Branson also filed an application for supplemental security income on July 8, 1997, which was initially denied on November 7, 1997. (Tr. 128-131). As noted by the declaration of Olga C. Kelley (Tr. 165-169), there is no indication that Branson was sent notice regarding her request for reconsideration of the initial determination on her application for supplemental security income.

<sup>2</sup> Paragraphs are numbered chronologically seriatim as they appear throughout the ALJ’s decision.

that Branson had severe obesity, but found that neither of her impairments were severe enough to meet or medically equal any of the listed impairments. (Tr. Id.; 22 ¶ 21); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that during the relevant period Branson could not perform her past relevant work, but was not disabled, and had the residual functional capacity (“RFC”) to perform unskilled light work with the option to sit or stand. (Tr. 22-23 ¶¶ 23, 25, 28, 30; 23-24 Finding Nos. 7, 8, 14). With the testimony of a vocational expert (“VE”), the ALJ further concluded that Branson was able to make an adjustment to work that exists in significant numbers in the national economy. (Tr. 23 ¶ 27; 24 Finding No. 13; 96-105).

C. The Court has plenary review of legal issues, but reviews the ALJ’s factual findings to determine whether they are supported by substantial evidence. Schaudeck v. Comm’r of Soc. Sec., 181 F.3d 429, 431 (3d. Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ’s conclusion is supported by substantial evidence, this Court may not set aside the Commissioner’s decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

D. Branson raises several arguments that the ALJ’s determination was legally and factually erroneous. Because the Commissioner did not apply the proper legal standards regarding Branson’s obesity evaluation, I must remand to allow the Commissioner to conduct the proper analysis.

1. Branson argues that the ALJ should have applied the former obesity section, 9.09 of the Listing of Impairments (“Listing 9.09”) to Branson’s claim instead of applying social security ruling (“SSR”) 00-3p which provides guidance in evaluating obesity since the deletion of Listing 9.09. SSR 00-3p, 2000 SSR LEXIS 5, at \* 19.<sup>3</sup> Although Branson’s claim was in effect before the deletion of Listing 9.09, SSR 00-3p states that “[t]he final rules deleting Listing 9.09 apply to claims that were filed before October 25, 1999, and that were awaiting an initial determination or that were pending appeal at any level of the administrative review process or that had been appealed to court.” Id. Although the ALJ followed the instructions of the Appeals Council and followed the ruling which was binding upon him, Branson’s argument attacks the

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<sup>3</sup> Listing 9.09 was deleted on October 25, 1999. SSR 00-3p, 2000 SSR LEXIS 5, at \* 19. SSR 00-3p, has since been superseded by SSR 02-1p, without any substantive changes. 2002 SSR LEXIS 1, at \*1. I rely on SSR 00-3p because it was applied in the ALJ’s June 18, 2002, decision, but I note that my analysis would not be different under the newer ruling.

validity of the ruling itself.<sup>4</sup> (Tr. 199-200). She argues that the deletion of Listing 9.09 has a retroactive effect and that to apply a rule retroactively, Congress must have expressly granted the agency authority to engage in retroactive rulemaking and clearly indicated that the rule had retroactive effect.

I find merit in Branson's argument. It is evident that there is a lack of agreement on the retroactive effect of SSR 00-3p on pending claims among the circuit courts. See Combs v. Comm'r of Soc. Sec., 400 F.3d 353 (6th Cir. 2005) (*vacated and stayed for rehearing en banc*); Cherry v. Barnhart, 125 Fed. Appx. 913, 915-916 (10th Cir. 2005); Barthelemy v. Barnhart, 107 Fed. Appx. 689, 693 (7th Cir. 2004); 2000 SSR LEXIS 5. It is further apparent that there is even disagreement between districts within the Third Circuit. See Rogers v. Barnhart, No. 01-4428, 2003 U.S. Dist. LEXIS 18152, at \* 8 (E.D. Pa. Sept. 17, 2003) (concluding that the deleted Listing should be applied to plaintiff's claim and noting that to apply the deletion retroactively, the Commissioner must have the authority to apply rules retroactively); Portlock v. Barnhart, 208 F. Supp. 2d 451, 457, 462 (D. Del. 2002) (holding that the Commissioner does not have the authority to promulgate rules that have retroactive effect, and that Listing 9.09 must be applied on claims pending appeal); but see Glen v. Massanari, 00-4184, 2001 U.S. Dist. LEXIS 13496, at \* 7 (E.D. Pa. Aug 27, 2001) (holding that in considering the appeal, the Court must consider Listing 9.09 as having been deleted, even if it had been part of the regulations at the time the ALJ made the decision). Finally, in the context of other rule changes, this Court has been willing to recognize retroactivity when the new rule contains explicit language indicating an intent for retroactive application and there is an express grant by Congress to the administrative agency to apply rules retroactively. Reynolds v. Barnhart, No. 03-2397, 2004 U.S. Dist. LEXIS 17768, at \*11-13 (E.D. Pa. Aug. 26, 2004) (*vacated and remanded on other grounds*).

Despite a national disagreement over the validity of the Social Security Administration's ("Administration") ability to promulgate rules retroactively, I find persuasive those cases which reason that the Administration does not have the authority to engage in retroactive rulemaking.<sup>5</sup> Reynolds, 2004 U.S. Dist. LEXIS 17768, at \*11-13; Rogers, 2003 U.S. Dist. LEXIS 18152, at \* 8; Portlock, 208 F. Supp. 2d at 462. While the language of SSR 00-3p demonstrates the agency's intent that the rule apply retroactively, it cannot apply retroactively without express congressional authorization. Reynolds, 2004 U.S. Dist. LEXIS 17768, at \*11-13 (citing Rogers, 2003 U.S. Dist. LEXIS 18152); 2000 SSR LEXIS 5, at \* 19. Although the statutory grant of authority given to the Commissioner is broad, it does not give the Social Security Administration the power to engage on retroactive rulemaking. 42 U.S.C. § 405(a); see Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-209, 213 (1988). In addition, retroactive application in this context goes to the heart of the claimant's right to seek benefits in that it would significantly increase the pre-existing threshold for obese claimants to meet the disability

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<sup>4</sup> Although they lack the force of regulations, social security rulings are "binding on all components of the Social Security Administration." 20 C.F.R. § 402.35(b)(1); Burns v. Barnhart, 312 F.3d 113, 127 (3d Cir. 2002).

<sup>5</sup> It should be noted that the only circuit court, the Seventh Circuit, and the only district court decision within the Third Circuit to assume the new regulations may be applied retroactively, upheld *pro forma* reliance on the right of the Administration to promulgate rules retroactively. Barthelemy, 107 Fed Appx. at 693; see also Glen, 2001 U.S. Dist. LEXIS 13496, at \* 7.

requirements under the Act. Republic of Aus. v. Altmann, 541 U.S. 677, 694 (2004) (noting that if substantive rights are affected, the change is impermissibly retroactive if applied to pre-enactment conduct, whereas, if the change only affects matters of procedure, the changes may be applied to all pending cases regardless of when the underlying conduct occurred). Here, the lack of explicit congressional authority to allow the Administration to engage in retroactive rulemaking and the substantive nature of the regulatory change impermissibly impaired rights possessed by Branson when her claim was filed, and therefore, I conclude that Branson's claim should be reviewed under Listing 9.09.

E. Because I conclude that Branson's claim should have been evaluated under Listing 9.09, and therefore must remand, it is unnecessary to evaluate Branson's argument that she meets Listing 9.09. However, I have considered Branson's remaining arguments that: (1) the ALJ failed to adequately explain his findings at step three; (2) the ALJ's reliance on the medical expert was unjustified because his RFC assessment addressed a typical person, while the ALJ's duty was to make an individualized determination specific to Branson; (3) the ALJ distorted the opinion of Branson's treating physician and failed to adequately explain why the ALJ afforded him little weight; (4) the ALJ's reasons for rejecting her testimony are without merit; (5) the ALJ relied on VE testimony that was contrary to agency policy articulated in SSR 83-12, 1983 SSR LEXIS 32 and SSR 00-4p, 2000 WL 1898704; and (6) the ALJ failed to comply with SSR 83-20, 1983 SSR LEXIS 25; and I find them each to be without merit.

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner did not apply the correct legal standard when evaluating Branson's claim. As a result, the action must be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g). Therefore, **IT IS HEREBY ORDERED** that:

1. The motion for summary judgment by **JANICE BRANSON** is **GRANTED**; to the extent that the matter is remanded for further evaluation consistent with this order.
2. The motion for summary judgment by the defendant is **DENIED**.
3. The Clerk of Court is hereby directed to mark this case closed.

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LOWELL A. REED, JR., S.J.